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CITATIONS.

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CITATIONS—(Continued)

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

Nos. 802 and 803.

DEBARDELEBEN COAL CORPORATION,
Petitioner,

versus

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE, ETC., IN OPPOSITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 152) is reported at 166 F. 2d 509.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 5, 1948, (R. 160, 161) and a petition for rehearing was denied April 13, 1948 (R. 167). The petition for writ of certiorari was filed May 13, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347).

QUESTIONS PRESENTED.

1. Whether petitioner, after arbitrarily refusing to give the Louisiana assessing authorities any information whatsoever, as to their watercraft, can now be heard to complain of the method of assessment used in taxing such watercraft.

2. Whether, even though the Louisiana laws give a taxpayer ample opportunity to correct a method or amount of assessment, by invoking the Louisiana Statutes, and a taxpayer refuses to follow such procedure, such taxpayer can ask a Federal Court to review the method of assessment.

3. Whether, when the Circuit Court of Appeals, in a broad interpretation of the Federal Rules of Civil Procedure, remands the case, to determine whether excess taxes were paid, the taxpayer, in the interim, can secure a review by this Court of the so-called method of assessment.

THE STATUTE INVOLVED.

The statute involved is Act 152 of 1932 as amended by Act 59 of 1944 of the Legislature of Louisiana.

Act 152 of 1932 provides, in part:

> "* * * the rolling stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose line lies partly within this State and partly within another State or States, or whose sleeping cars run over any line lying partly within this State or partly within another State or States, shall be assessed in this State in the ratio which the number of miles of the line within the State has to the total number of miles of the entire lines."

Act 59 of 1944, provides, in part:

> "Movable Personal Property.—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively but not exclusvely, as the engines, cars and all rolling stock of railroads; the boats, barges and other watercraft and floating equipment of water transportation lines); * * *
>
> "(f) The movable personal property of such persons, firms, or corporations, whose line, route, or system is partly within this State and partly within another state or states, shall be by the Commission valued for the purposes of taxation and by it assessed; * * *

"I. The portion of all of such property of such person, firm or corporation shall be assessed in the State of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the State bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation."

STATEMENT.

DeBardeleben filed these two suits against the City of New Orleans to secure the return of taxes collected on their watercraft in Louisiana for the years 1944 and 1945, which taxes were levied under Act 152 of 1932 as amended by Act 59 of 1944 of the Legislature of Louisiana. Petitioner alleged that the tax was unconstitutional because it was a burden upon interstate commerce, because it violated the due-process clause of the State and Federal Constitutions, and in the alternative, if the taxing situs was in Louisiana the method used by the Louisiana Tax Commission was incorrect and resulted in an excessive assessment (R. 8, 9).

Petitioner never alleged that any watercraft wholly outside of Louisiana was ever assessed.

The United States District Court found no merit in petitioner's complaint as to the method of assessment and held that Louisiana was the taxing situs of the watercraft of "Coyle Lines" (trade name of DeBardeleben's

Marine Division) for the watercraft used in and through New Orleans and Louisiana. The District Court held, however, that Louisiana had the right to the whole of these taxes, and to partly tax under these Louisiana Statutes was illegal, null and void (R. 66).

Nor could the United States Circuit Court of Appeals for the Fifth Circuit find any merit in petitioner's allegation as to the method of assessment, the Court holding that the method of assessment was causd by DeBardeleben's own willful acts on their "refusal to furnish requested information" (R. 159). The Court of Appeals, however, reversed the District Court, holding that the City of New Orleans had the right to these taxes under the Statutes involved, and remanded the case to determine whether DeBardeleben paid excess taxes (R. 160).

Petitioner does not complain of the finding of the situs of this watercraft in Louisiana, but restricts its application for writ of certiorari to the question of the method of assessment.

ARGUMENT.

Petitioner's application discloses a very unique situation. It seeks to have this Court review a method of assessment on certain facts—which method of assessment was caused solely by its own capricious and arbitrary acts.

Briefly, the Louisiana Tax Commission (the assessing authority) sought by every means at its command to secure the value of petitioner's watercraft and its mileage within and without Louisiana. The Commission sent letters and even sent its field-men to petitioner's place of business, but DeBardeleben refused to give any of this information whatsoever. This is shown by the agreed stipulation in the record (R. 19). What was the Tax Commission then to do? It did the only thing left to do and filled in the return "from the best information it could obtain." This is in accordance with Louisiana law, when a taxpayer refuses the information (Act 170 of 1898 of the Legislature of Louisiana, Sec. 19). The Commission, in its desire to be absolutely fair, used the valuation of similar tow-boats and barges from other companies who had actually made returns to the Tax Commission, (R. 111) and did not use a "crystal ball" or "pull figures out of the air" as counsel would have this Court believe.

Thus, DeBardeleben itself caused the situation of which it now seeks here to complain! Now, at this late date, because the assessment does not meet petitioner's conception of correctness, it seeks the intervention of a Federal Court. It was never contemplated, under our law, that a litigant could benefit from its own willful and arbitrary acts. In other words, this is not a "game" of "hide and go seek" whereby the DeBardeleben Coal Corporation thwarts the Louisiana Tax Commission in its every effort to secure exact information and then seeks to have this Court protect it from the consequences of its own act.

If DeBardeleben believed the method or the amount of the assessment was wrong, it had ample opportunity for a hearing before the assessing authorities within a reasonable time, and could then appeal to the Louisiana Courts. (Act 39 of 1922 of the Legislature of Louisiana). It did none of these things. It chose to file a suit in Federal Court to test the constitutionality of the tax itself. This it had a right to do, but had no right, in that forum, to contest the method of assessment or the amount of the tax.

Petitioner does not seek a review here of the constitutionality *vel non*, of the tax itself, but seeks to inject the issue of the unconstitutionality of the method of assessment. Clearly, there is no Federal question presented in this application.

Both the United States District Court and the United States Circuit Court of Appeals for the Fifth Circuit, both found, *on a question of fact*, that there was no merit whatsoever in petitioner's contention as to the method of assessment. Neither of these Courts, at any time, found that the method of assessment employed by the Louisiana Tax Commission violated the due process of law clause of the Constitution.

The Circuit Court of Appeals, in its opinion (R. 153) shows:

> "The trial below resulted in judgment for each of the appellees, ordering the return of the taxes paid, the court holding * * * in the case of DeBardeleben, that, while Louisiana had the right to tax such of its property as had a tax situs in Louisiana, the assess-

ment on the proportionate rule basis as made was illegal, null, and void."

The Court of Appeals, of course, corrected the erroneous conclusion of the District Court, holding, in effect, that if Louisiana had the right to the whole of this tax, it could take but a portion thereof if it desired.

The Circuit Court of Appeals has remanded these two cases to the District Court to "ascertain from the present record, or that record supplemented by additional evidence, whether DeBardeleben has paid excess taxes for the tax years, and, if it has, under Act 330 of 1938, order a refund of the excess paid, with interest." (R. 160.) Thus, even though petitioner maintains that it never has at any time, complained of the amount of the assessment, the Court of Appeals has given them even more than that to which they are entitled, because their suits are not for a reduction of the assessment, but for a cancellation of the entire assessment, and under Louisiana practice, reduction, in the absence of an alternative plea therefor, may not be decreed in a suit for cancellation. *Fidelity Mutual Life Insurance Co. v. Fitzpatrick*, 125 La. 976, 52 So. 118, 120. The Court of Appeals, however, in a broad interpretation of Rule 54 (c), Federal Rules of Civil Procedure, is giving petitioner relief even though not demanded. These suits, therefore, now stand remanded to the District Court to obtain more facts as to the correct assessment. Thus, petitioner is getting all the relief to which it could possibly be entitled.

Petitioner seeks to inject here the issue of including "eight barges in Alabama" in the assessment. This ques-

tion was never raised by the pleadings. It was only raised in argument.

Louisiana never, at any time, included in its assessment, any barges wholly within the State of Alabama. This is clearly demonstrated by an examination of the actual assessment sheet of the Louisiana Tax Commission on DeBardeleben Coal Corporation (R. 69). This is the basis of the assessment and shows the levy against DeBardeleben Coal Corporation, doing business as "Coyle Lines" (dba Coyle Lines). The trade-name "Coyle Lines" is the Marine Division of DeBardeleben Coal Corporation. The record shows that the eight barges in Alabama belonged to the Mining Division of DeBardeleben—a wholly different subsidiary. The Louisiana Tax Commission never, at any time, made an assessment of property of the "Mining Division" but solely of the "Marine Division" (Coyle Lines). The assessment was restricted to property used within the State of Louisiana and is further demonstrated from the quotation in petitioner's brief (p. 24) when the Chairman of the Louisiana Tax Commission testified "that would be a fair assessment *for the property in Louisiana*". (Emphasis ours.)

Possibly, because petitioner has sought to cloud the issue with this reference to the inclusion of certain barges in Alabama, the Circuit Court of Appeals deemed it advisable to remand the matter to ascertain the exact situation. For even if true (which respondent vigorously denies) the Court of Appeals decreed:

> "The erroneous inclusion of property in an assessment is ground for reduction, not cancellation.

Griggsby Construction Co. v. Freeman, 108 La. 435, 32 So. 399." (R. 159.)

There is no jurisdiction, therefore, in this Court, to grant a writ of certiorari, because there is no Federal question involved; further, these two cases now stand remanded to the District Court for further evidence as to the amount of the assessment, and to ascertain what is actually included.

The cases cited and quoted from by counsel for petitioner find no application here. They are not at all analogous to the issue presented here, and we shall attempt to briefly show this.

California v. Pacific Railroad Company, 127 U. S. 129, and *Santa Clara County v. Southern Pacific Railroad Company,* 118 U. S. 394, involved state taxation of franchises received from the United States Government and which it was prohibited from taxing by the constitutions of the state or the United States. The Court in *California v. Pacific Railroad Company (supra)* stated in conclusion:

> "This renders it unnecessary to express any opinion on the application of the Fourteenth Amendment, as the result would not be different whatever view we might take on that subject."

The next case quoted from by counsel for petitioner, *Clearwater Timber Company v. Shoshone County, Idaho,* 155 Fed. 612, 632, involved the taxation of land owned by the United States Government, before the transfer was completed to plaintiff, and consequently complainant was

not the owner of this land at the time taxes were levied, title being in the United States. It is interesting to note that immediately after the quotation on page 19 of petitioner's brief, the Court had occasion to observe:

> "However, I do not decide what, if any, application of this principle would have to the record in this case if it appeared that a part of the lands in evidence were subject to taxation. I am of the impression that I would seek hopefully for some method under the law by which the plaintiff would be required to pay a just proportion of the taxes before it received protection against that which was unjust. But, it being my view of the law that none of these lands were subject to taxation in 1903 and 1904, complainant's prayer is not beset with any equitable objections. It had and has no duty either at law or in equity to pay these taxes in whole or in part. * * *
>
> "I have no disposition to assist parties in escaping a just proportion of the burden of taxation on account of technical defects in the proceedings of revenue officers in levying and enforcing the payment of taxes. * * *"

Texas and Pacific Railroad v. Abilene Cotton Company, 204 U. S. 426, indicates that petitioner should have pursued its remedy, if any, through the Louisiana Tax Commission, which respondent has always contended.

Much reliance is placed by petitioner on *Union Tank Line Company v. Wright, Comptroller General of Georgia*, 249 U. S. 275, 39 S. Ct. 276. That case differs widely from the issue here. While approving, in effect, the tax apportionment principle on a mileage basis, the Court held

that even though Georgia knew the exact number of cars in the State at a given time (as admitted in the agreed stipulation) they adopted a plan so arbitrary as to unduly burden interstate commerce. In that case, a correct return *was filed* by the Union Tank Line Company—in the instant cases *no return* was filed, even though requested, effectively keeping from the Louisiana Tax Commission the data needed. The *Union Tank Line Company* case *(supra)* was decided on a question of fact. The facts in the present cases are wholly in favor of respondent's position.

The information needed lies wholly within the breast of the taxpayer. For, if the state authorities were required to keep a check, either upon the average use or aggregate mileage covered by the movements of interstate common carriers within the State, and to supplement this with observations in other states in order to arrive at the due proportion, the cost of administration easily might consume the tax.

Fargo v. Hart, 193 U. S. 490, 242 S. Ct. 498, is not at all applicable because Louisiana is not seeking to tax property wholly beyond its jurisdiction.

Counsel cites *Nashville Company & St. Louis Railroad v. Browning,* 310 U. S. 362, 60 S. Ct. 968, 973, which really substantiates respondent's position. In that case, Tennessee taxed this interstate carrier by taking the ratio which petitioner's mileage in Tennessee bore to its total mileage. After approving this principle of taxation, the Court went on to say:

> "We conclude, therefore, that the Commission's over-assessment of petitioner's property, if over-assessment there was, constitutes no deprivation of any right under the Federal Constitution."

The last case quoted from by petitioner, *Connecticut General Life Insurance Company v. Johnson*, 58 S. Ct. 436, 303 U. S. 77, involved the right of California to tax premiums of a Connecticut company on premiums received in Connecticut on reinsurance contracts—obviously inapplicable to the issue here.

Thus, counsel for petitioner has cited no case where a Court has found for petitioner on this issue—that is, the method of assessment, when the taxpayer has arbitrarily withheld the pertinent facts, nor can such a case be cited.

And it needs no citation of law by respondent to show that the issue here is purely a state function, when the state itself gives every opportunity for the correction of the method or amount of assessment, which method the present petitioner arbitrarily refused to invoke.

The Louisiana courts have had occasion to pass on this question of assessment.

In *Griggsby Construction Co. v. Freeman*, 108 La. 435, 32 So. 399, the Supreme Court of Louisiana stated:

> "We shall consider only the ground insisted on in the brief, and shall take them up in the order in which they are presented in the brief:

> "I. That the assessment includes property not belonging to plaintiff, and for the taxes on which plaintiff is not responsible: Suffice to say that plaintiff, having been called upon by the assessor to furnish a list of its property, and having failed to do so, is, by the express terms of the revenue act (section 14), 'estopped from contesting the correctness of the assessment list filed by the assessor'."

In *Betron, etc., v. New Orleans,* 131 La. 73, 59 So. 19, the Supreme Court of Louisiana went on to say:

> "Plaintiff made no return of property for assessment, and is therefore estopped by the statute from contesting the correctness of the assessment list filed by the assessor. Section 25 of Act 170 of 1898. * * *"

It should need no citation of the law, however; simple common-sense, equity, logic and justice must decree that petitioner's position here is untenable.

CONCLUSION.

Petitioner is not seeking here a review of the law of situs in taxation, the issue being restricted solely to a question of the method of assessment.

The due process of law clause of the Fourteenth Amendment is fully satisfied by the Louisiana Statutes, which give a taxpayer the right of appeal to the assessing authorities to correct any discrepancy in the method or

amount of the assessment, and then a right of appeal to the Courts of Louisiana.

The DeBardeleben Coal Corporation refused to follow this procedure, refusing to apply for the relief granted them by the Louisiana law as to the method of this assessment. Petitioner, therefore, cannot now complain that there has been a taking of its property without due process of law, when ample opportunity has been afforded it to correct any alleged errors in the method of assessment.

The Circuit Court of Appeals correctly found that the taxing authorities could only do what they actually did in these two cases, and that is, make an assessment from the best information they could obtain in view of the arbitrary position taken by petitioner.

Thus, it is self-evident that petitioner has no right, and should have no right, to invoke the supervisory powers of this Court to review a method of assessment for which they were solely to blame, and for which the Louisiana law itself gives ample remedy.

In addition thereto, the Circuit Court of Appeals has remanded these cases, giving petitioner even more relief than that to which it is entitled, under these circumstances.

Patently, there is no Federal question presented here, and the application for writs of certiorari should therefore be denied.

Respectfully submitted,

HENRY G. McCALL,
City Attorney,
HENRY B. CURTIS,
First Assistant City Attorney,
ALDEN W. MULLER,
Assistant City Attorney,
HOWARD W. LENFANT,
Special Counsel,
Attorneys for Respondent.

This is to certify that copies of this brief have been served on opposing counsel on this the 8 day of June, 1948.

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